United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

original w/affidavit of mailing

74-2266

To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2266

UNITED STATES OF AMERICA,

Appellant,

—against—

ANDREW FUREY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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Eastern District of New York.

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Preliminary Statement

The United States appeals from a judgment of the United States District Court for the Eastern District of New York (Dooling, *J.*) entered on August 26, 1974, ordering the dismissal of the information upon which the defendant Andrew Furey had previously been adjudged to be a juvenile delinquent in violation of Title 18, United States Code, § 5031. The judgment of dismissal was entered after a hearing to determine whether the neglect on the part of the United States to file its notice of readiness within six months, as required by the Eastern District Plan for the Prompt Disposition of Criminal Cases, was "excusable". The hearing was held on remand, after this Court had vacated the original judgment, which found that the defendant was a juvenile delinquent and rejected his claim that the Eastern District Plan had been violated. *United States* v. *Furey,* 500 F.2d 338 (C.A. 2).

On remand, the district court concluded that, while the neglect in failing to file the notice of readiness was "understandable", it was not "excusable" (A. 22). Moreover the district court also rejected the challenge by the United States to the validity of Rule 50(b), and the Eastern District Plan. In so doing, the district court observed (A. 23):

> The Government argues that Rule 50(b) does not authorize the inclusion in Plans for Achieving Prompt Disposition of a provision for dismissal with prejudice and that the Model Plan made available by the Judicial Conference contained a contrary provision—that non-compliance with the Plan schedules should not require dismissal, but should not prevent dismissal for unnecessary delay under Rule 48(b). It is suggested that otherwise the Plan as here applied would be invalid as beyond the judicial rule-making power. But rejection of these contentions is the major premise of the many decisions enforcing the rules of the Plan and the earlier prompt disposition rules of the Court of Appeals.

Questions Presented

The United States does not here challenge the determination of the district court that its neglect in filing the notice of readiness (although it was ready for trial during the required period [A. 11-12]) was "understandable" but not "excusable". We do, however, press our argument here that the Eastern District Plan is invalid. This argument involves three basic issues:

1. Whether F. R. Crim. P., Rule 50(b), is a "rule of pleading, practice and procedure" within the meaning of Section 3771 of Title 18 of the United States Code;

2. Whether a rule which mandates dismissal of a criminal charge with prejudice can, consistent with the doctrine of separation of powers, be promulgated by the Judicial Branch, where it marks significant departure from well established legal principles and effectively overrides the determination of Congress that the defendant be held to answer for the offense;

3. Whether Rule 50(b) was intended to authorize the promulgation of a rule mandating dismissal with prejudice merely because a specified period of time has passed without indication by the United States that it was ready for trial.

ARGUMENT

The Eastern District plan is invalid.

A. Introduction

The order of the district court, vacating the judgment pursuant to which the defendant had been found to be a juvenile delinquent, and dismissing the information against him, was entered on the authority of the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases. This Plan in turn was adopted pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure which provides in pertinent part:

> To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare a plan for the prompt disposition of criminal cases which shall include rules relating to time limits within which procedures prior to trial, the trial itself, and sentencing must take place, means

> of reporting the status of cases, and such other matters as are necessary or proper to minimize delay and facilitate the prompt disposition of such cases. The district plan shall include special provision for the prompt disposition of any case in which it appears to the court that there is reason to believe that the pretrial liberty of a particular defendant who is in custody or released pursuant to Rule 46, poses a danger to himself, to any other person, or to the community. The district plan shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of the district court may designate. If approved the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States. The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. * * *

Rule 50(b) was promulgated by the Supreme Court pursuant to Title 18 United States Code, § 3771, which authorizes the Supreme Court "to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict * * * ". These rules, which have the force and effect of law, take effect ninety days after they have been reported to Congress by the Chief Justice.

Our submission that the Eastern District Plan is invalid rests upon three separate bases. First, we believe it plain, that Rule 50(b) is not "a rule of pleading, practice, and

procedure" and is therefore an invalid exercise of the rule-making power vested in the Supreme Court by Section 3771 of Title 18. Second, to the extent that it purports to authorize the district court to create defenses to charges of criminal violations of the United States Code merely because of the passage of an arbitrary period of time, it unconstitutionally usurps the powers which the constitution vests in the Congress and the President. Third, there is substantial support for the view that Rule 50(b) was never intended to authorize the promulgation of the sanction invoked by the district court here.

We recognize, of course, that Rule 50(b) was promulgated by the Supreme Court and it should not lightly be presumed that the Supreme Court would knowingly promulgate a rule which did not conform with Section 3771 or the Constitution. But the Supreme Court has admonished that the mere fact that it "promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." *Mississippi Pub. Corp.* v. *Murphee*, 326 U.S. 438, 444; see, also, *Pabellon* v. *Grace Line*, 191 F.2d 169, 179, n. 5, concurring opinion of Frank, J. (C.A. 2). Accordingly, we proceed to our consideration of the validity of Rule 50(b) and the Eastern District Plan which was adopted pursuant to it.

B. Rule 50(b) is invalid because it does not conform with the rules enabling act

Rule 50(b) is not "a rule of pleading, practice and procedure" within the meaning of Section 3771; instead it purports to establish a mechanism for the adoption of such rules by the district courts subject to review by the several circuit councils. In so doing, it amounts to an improper delegation by the Supreme Court of its rule-making function; and it eliminates altogether the important power reserved by Congress in Section 3771 "to examine proposed rules, laws and regulations before they

become effective * * * to make sure that the action under the delegation [of rulemaking authority] squares with the Congressional purpose". *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15. Rather than Congress exercising prior review of the rules promulgated by the Supreme Court, the Circuit Council sits to review procedural rules adopted by the district courts. This is clearly contrary to the provisions of Section 3771 and the regime which Congress prescribed for the adoption of the Federal Rules of Criminal Procedure and subsequent amendments.

C. The Eastern District plan is invalid because its formulation of a dismissal with prejudice sanction exceeds the scope of the judicial rule making power

The more basic objection to the Eastern District Plan, and to its predecessor—the Speedy Trial Rules promulgated by the Circuit Council—is that it intrudes upon the legislative powers vested in the Congress, and that it deprives the President altogether of the significant role in the legislative process which the Constitution vests in the Executive Branch. Quite plainly, had Congress chosen to legislate a plan similar to the Eastern District Plan, it could have done so (over the objection of President) only by two-thirds vote of both the House and Senate. Yet, by doing nothing for ninety days after the Supreme Court promulgated Rule 50(b), Congress has in effect deprived the President of any legal role in the adoption of a major piece of legislation.

We emphasize here that we do not argue that Congress may not delegate to the Judicial Branch the authority to formulate procedural rules to facilitate the exercise of the judicial powers; indeed, the Judicial Branch may possess the inherent power to formulate such rules. Our position, however, is that this power is not without its limitations; and that those limitations are breached when, a "pro-

cedural rule" is promulgated which marks a break with settled substantive law and involves the kind of policy determination which ought to be made by Congress and the Executive Branch. This distinction was best stated by Mr. Justice Brandeis in *Washington-Southern Co.* v. *Baltimore Co.*, 263 U.S. 629, 635-36:

> The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred."

The Eastern District Plan, as well as its predecessor, goes well beyond the traditional scope of rules of practice and procedure.[1]

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[1] *Hilbert* v. *Dooling*, 476 F.2d 355 (C.A. 2, *en banc*) certiorari denied, 414 U.S. 878, did not involve the issue whether the Circuit Council Rules were constitutionally infirm. Rather it dealt with whether the Circuit Council had the power under T. 28 U.S.C., § 332 to promulgate them. While we continue to adhere to the view that Section 332 confers no such power (see, Korman *Introduction to Second Circuit Review—Civil Procedure*, 40 *Brooklyn L. Rev.* 947-952), the holding in that case is not dispositive here.

First, it marks a substantial break with the well-settled substantive rule that, except where the Speedy Trial Clause has been violated, a dismissal with prejudice is an "unsatisfactorily severe remedy" because in practice, "it means that a defendant who may be guilty of a serious crime will go free without having been tried". *Strunk* v. *United States*, 412 U.S. 434, 439-440, quoting *Barker* v. *Wingo*, 407 U.S. 514, 522. Indeed, until the adoption of the Circuit Council Speedy Trial Rules, the dismissal of an indictment with prejudice merely because of the passage of a specified period of time was totally unprecedented. While it has been suggested that at common law, a district court possessed inherent power to dismiss an indictment for unnecessary delay in prosecution (F.R. Cr. P., Rule 48(b), Advisory Committee Notes), the only case cited in support of that assertion, *Ex Parte Altman*, 34 F. Supp. 106 (S.D. Cal.), demonstrates that, to the extent such an inherent power was recognized, it was limited to dismissal *without* prejudice.[2] Thus in *Ex Parte Altman*, *supra*, the issue was whether a district court had the power to vacate an order which it had previously entered dismissing an indictment for failure to prosecute. The district court held that such action was proper "unless the act has acquired a finality which is beyond the court's reach" (34 F. Supp. at 108). Concluding that a dismissal for failure to prosecute was not such a final order, the district court summarized the consequences of a dismissal for want of prosecution (34 F. Supp. at 108-109, emphasis added):

> * * * [T]he order of dismissal [for want of prosecution] was neither a judgment nor was it final. A dismissal or nolle prosequi does not work an acquittal. *Dealy* v. *United States*, 1894, 152 U.S.

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[2] There is reason to doubt that any such inherent power existed at all. Compare *Frankel* v. *Woodrough*, 7 F.2d 796, 798 (C.A. 8); *Daniels* v. *United States*, 17 F.2d 339 (C.A. 9); *Fowler* v. *Hunter*, 164 F.2d 668 (C.A. 10); *Miller* v. *Overholser*, 206 F.2d 415 (C.A.D.C.).

> 539, 543 * * * ; *Meyers* v. *United States*, 3 Cir., 1929, 36 F.2d 859, 861; *Cochran* v. *United States*, 8 Cir., 1930, 41 F.2d 193, 207; *Miller* v. *United States*, 9 Cir., 1931, 47 F.2d 120. *Or bar a second prosecution for the same offense.* *Wolff* v. *United States*, 1 Cir., 1924, 299 F. 90. It does not constitute jeopardy. *United States* v. *Percansky*, D.C. Minn., 1923, 298 F. 991. Nor is it an appealable order. *Lewis* v. *United States*, 1910, 216 U.S. 611 * * *. Emphasis added.

This holding reflects the settled principle that "[a]t the common law and in the absence of special statutes of limitations the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the Government or the failure of the grand jury to indict" within a reasonable time after arrest. *United States* v. *Cadaar*, 197 U.S. 475, 478; *United States* v. *Marion*, 404 U.S. 307, 317.[3]

Moreover, while it is true that under Rule 48(b), a dismissal for unnecessary delay may be with or without prejudice (*Hilbert* v. *Dooling*, 476 F.2d 355 (C.A. 2, *en banc*), certiorari denied, 414 U.S. 878), Rule 48(b) has

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[3] In *United States* v. *Cadaar*, *supra*, the issue presented was whether a statute, which provided that if any person "charged with a criminal offense shall have been committed or held to bail" the grand jury must act within a specified period of time or the accused would be set free (D.C. Code § 939, 31 Stat. 1342, now D.C. Code § 23-102, 84 Stat. 605). A defendant who had not been indicted within the time specified asserted that any further prosecution for the same offense was barred. In rejecting the claim, the Court held (197 U.S. at 479, emphasis added):

> If it had been the purpose of Congress to work so *radical a change* in the law as to end the right of further prosecution for the offense, we think it would have used language apt for the purpose, and the failure so to do indicates the intention to deal only with delays in action by the grand jury against persons under arrest or bonds.

been construed uniformly to authorize a dismissal with prejudice only under circumstances where a defendant can demonstrate that he demanded a speedy trial and that he suffered prejudice to his right to a fair trial. *United States* v. *Favalaro*, 493 F.2d 623, 626 (C.A. 2). As Mr. Justice Clark recently stated in writing for this Court (*United States* v. *Crutch*, 461 F.2d 1200, 1202):

> Since the delay here involved is not substantial, a dismissal [without prejudice] under Rule 48(b) can only be claimed upon some showing that the defendant has been or will be prejudiced.

Indeed, it seems clear that a dismissal with prejudice is mandated under Rule 48(b) only "where there is a finding that the Speedy Trial Clause has been violated." *Cohen* v. *United States*, 366 F.2d 363, 367 (C.A. 9), certiorari denied, 385 U.S. 1035; *Mann* v. *United States*, 304 F.2d 394, 397 (C.A.D.C.), certiorari denied, 371 U.S. 896; *United States* v. *Mark II Electronics of Louisiana, Inc.*, 283 F. Supp. 280, 284 (E.D. La.); cf. *United States* v. *Apex Distributing Co.*, 270 F.2d 747, 750-751 (C.A. 9); *United States* v. *DiStefano*, 464 F.2d 845, 849 (C.A. 2); *United States* v. *Chase*, 372 F.2d 453 (C.A. 4), certiorari denied, 387 U.S. 907. Accordingly, it is plain that under the applicable standards and rules of the United States, which expressly deal with issue of speedy trials, a dismissal of the indictment in the instant case would not be warranted.

Second, in addition to the substantive change in the law effected by the provisions of the Eastern District Plan, the determination to afford the sanction of a dismissal with prejudice ultimately reflects a policy determination which should be made by the Legislative Branch. The purpose of the Eastern Plan, and the Circuit Council Rules, is not to protect the right of the defendant to a speedy trial. Rather it was intended to further the "public interest" in the prompt disposition of criminal cases. *United States* v. *Flores*, 501 F.2d 1356, 1358 (C.A. 2). Yet, we respect-

fully submit, the determination of whether the "public interest" in the prompt disposition of criminal cases should be vindicated by the sanction of a dismissal with prejudice involves a policy determination which belongs to Congress. Congress through the exercise of its legislative powers has decreed that this defendant—who has violated the United States Code—should be punished according to law; the determination reflected by the Eastern District Plan that he should be freed— in order to vindicate other policies, plainly overrules that legislative judgment. Our position, indeed, is best summarized by the Senate Judiciary Committee in its Report on S. 754, a bill intended to deal in a comprehensive fashion with the problem on insuring speedy trials. There the Senate Judiciary Committee observed (S. Rep. 93-1021, pp. 18-19):

> "Rule 50(b), the Second Circuit rules, and the various responses to both the district courts and courts of appeal elsewhere in the Federal system are significant contributions to the cause of speedy trial. However, at the same time, their effect upon the separation of powers between coordinate branches of government should not be a subject of rejoicing by Members of Congress. For, in effect, the Supreme Court and the Second Circuit are doing what, under the Constitution, the Congress should be doing—legislating a solution to the problem of court delay. As Justice Douglas said in his dissent to the promulgation of Rule 50(b):
>
> There may be several better ways of achieving the desired result (speedy trial). This Court is not able to make discerning judgments between various policy choices where the relative advantage of the several alternatives depends on extensive fact-finding. That is a 'legislative' determination. Under our constitutional system that function is left to the Congress with approval or veto by the President. (406 U.S. 981)."

Moreover, even from a policy standpoint—as distinguished from a constitutional one—the legislative route towards realization of the speedy trial principle has manifold advantages. The thrust of the Eastern District Plan is restricted to delays caused by the prosecution. Since congested court dockets account for much, if not most, of the overall delay, the Eastern District Plan, due to its limited scope, falls short of addressing the broader problem of systematic delay in the administration of justice. A legislative solution, such as the proposed Speedy Trial Act of 1974, would provide the vital nexus between a speedy trial requirement and the appropriation process. By providing the mechanism for Congress to appropriate those additional resources necessary to fulfill the goals set by such a statute, a legislative scheme on the order of S. 754 would enable the entire federal criminal justice system to prepare for the gradual achievement of truly speedy trials. Without provision for more judges, prosecutors, public defenders and management technology, there is every likelihood that court congestion will retain its *de facto* ability to nullify speedy trial rules. Under present circumstances, moreover, the practical effect of the dismissal with prejudice sanction of the Eastern District Plan is to confer arbitrarily a benefit of immunity on a particular class of defendants as a result of inadvertent and nonprejudicial prosecutorial delays when even a statement of readiness would probably not in fact accelerate the trials of those defendants. See e.g. *United States* v. *Infanti*, 474 F.2d 522, 528 (C.A. 2); Cf. *United States* v. *Nazzaro*, 472 F.2d 302, 304 n. 2 (C.A. 2).

D. Rule 50(b) was not intended to authorize the formulation of a rule providing for dismissal with prejudice

There is a serious question as to whether the Supreme Court intended to vest in the district court the power to fashion a remedy of dismissal with prejudice. Before officially releasing Rule 50(b), the Judicial Conference produced "a more substantive alternative" in the form of a draft amendment to Rule 45. See Senate Comm. on the Judiciary, 93d Cong., 2d Sess., Report on Speedy Trial Act of 1974, S. Rep. 93-1021 at 18. That amendment, which was not adopted, set exacting time limits for the several stages in the criminal process: a 90-day limit between arraignment and trial for detainees, and 180-day limit for released defendants. It bears attention that the failure to meet those time limits would not have necessitated dismissal with prejudice. As the Senate Judiciary Committee observed (id. at 18). "Evidently, the Judicial Conference chose the district plans approach embodied in Rule 50(b) because it provided greater freedom of choice for the individual district courts and because of a proper reluctance to adopt a substantive speedy trial rule through amendment of the Criminal Rules of Procedure. Understandably, the Judicial Conference left the consideration of such changes to the Congress where it properly belongs."

Rule 50(b) was approved in turn by the Supreme Court and by the Congress. Prior to this effective date, the Administrative Office of the United States Courts circulated a Model Plan for implementation of the Rule. Section 4 of the Model Plan deals with the effect of non-compliance with the time limits; it provides:

> "Upon the expiration of a time limit as prescribed by or extended under this rule, a defendant who is in custody shall be released from custody unless the Court finds that the defendant is responsible for the failure to comply with the time limits. Subject to

> the provisions of 18 U.S.C. § 3416, if the Court finds that a defendant who is not in custody is responsible for failure to comply with the time limits, such defendant may have his release revoked unless there is good cause shown for the failure to comply. *Subject to the power of the Court to dismiss a case for unnecessary delay [pursuant to Federal Rules of Criminal Procedure Rule 48(b)], the failure to conform with the time limits herein prescribed shall not require the dismissal of the prosecution.*" (Emphasis added).

The Model Plan does not require or even suggest a mandatory dismissal sanction as is contained in the Eastern District Plan; nor, for that matter, does Rule 50(b) itself. In fact, the collective Second Circuit plans, by providing for dismissal with prejudice, place the district courts here in a rather small sample of federal jurisdictions where so stringent a penalty is specified. A. Cohen, Rule 50(b): Response of the District Courts, Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., at 229-31, 233.[4] Moreover, while the Advisory Committee notes to

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[4] An examination of 85 district court plans on file in the Administration Office for United States Courts (undertaken by the Department of Justice in 1973) indicated that 66 have adopted Rule 4 of the Model Plan without substantial change; 14 have adopted plans which provided in substance that the district court may take any appropriate action, including but not limited to dismissals for unnecessary delay under Rule 48(b); and 4 have adopted plans containing no provision at all. Only the District Court for the District of Massachusetts (outside the Second Circuit) provided for mandatory dismissal, although it does not indicate whether the dismissal shall be with prejudice.

Moreover, in the aforementionad study of the Rule 50(b) plans (*supra*, p. 14) by Andrew Cohn of the Yale Law School, it was recommended pointedly that "[a] dismissal without prejudice might serve as an intermediate alternative and might enhance the flexibility of judges seeking to enforce the time requirements in the plans." *Id.* at 233.

Rule 50(b) expressly refer to the Second Circuit Speedy Trial Rules, it must be emphasized that it was not until after Rule 50(b) was promulgated that this Court, in *Hilbert* v. *Dooling*, 476 F.2d 355 (C.A. 2 *en banc*, *certiorari denied*, 414 U.S. 878), "announced that dismissal under Rule 4 are with prejudice" (*United States* v. *Rollins*, 475 F.2d 1108, 1109 (C.A. 2). Since the Circuit Council's rule did not state that dismissal with prejudice was mandatory, and since the Chief Judge of the Circuit and the able district court judge in *Hilbert* v. *Dooling*, did not so read the Council rules, the reference to the Circuit Council Rules in the Advisory Committee Notes to Rule 50(b) is plainly inconclusive.

In sum, it seems clear that, consistent with the doctrine separation of powers, the Supreme Court and the Congress did not intend Rule 50(b) to authorize dismissals with prejudice for prosecutorial non-compliance with the respective district court plans.

CONCLUSION

The judgment of the district court dismissing the information should be reversed and the judgment finding the defendant to be a juvenile delinquent should be reinstated.

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the assistance of Richard F. Guay in the preparation of this brief. Mr. Guay is a second year law student at the New York University Law School.

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